UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
	:	10-CR-433 (SLT)
v.	:	
	:	June 3, 2010
JONATHAN BRAUN,	:	
	:	Brooklyn, New York
Defendant.	:	

TRANSCRIPT OF CRIMINAL CAUSE FOR DETENTION HEARING
BEFORE THE HONORABLE VIKTOR V. POHORELSKY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording,
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THE CLERK: Criminal cause for detention hearing. USA v. Braun, 10-CR-433.

Counsel, please note your appearances.

MR. TISCIONE: Steven Tiscione for the government.

MR. SHARGEL: Gerald Shargel and Ross Kramer for Mr. Braun. Good afternoon, your Honor.

THE COURT: Good afternoon.

I think the only matter is the question of detention; am I correct about that?

MR. SHARGEL: That's correct.

MR. TISCIONE: There's actually also an application for an order of excludable delay.

THE COURT: Oh, okay.

MR. SHARGEL: Which we've executed.

THE COURT: All right. Should I take care of that first? That will be the easiest thing to take care of, I think.

MR. TISCIONE: Fine.

THE COURT: I do have an application to exclude time between today and June 17, that is time under the Speedy Trial Act, and it's premised on plea negotiations, as well as trial preparations, given the complexity of the case.

Is June 17 the first appearance before Judge Townes?

MR. SHARGEL: That's the next appearance before Judge Townes, your Honor.

MR. TISCIONE: It is, your Honor.

THE COURT: All right. This document, the application, appears to be signed by Mr. Braun, as well as his counsel.

Did you sign the document, Mr. Braun?

THE DEFENDANT: Yes, sir.

THE COURT: Under federal law have the right to have your trial in this case begin within seventy days after your first appearance on the indictment, and by signing this document you're agreeing that the 14 days between today and June 17 will not be counted when computing that seventy-day deadline.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And for the reasons proposed, the entry of this order serves the ends of justice so I've entered it.

All right. Now, to the question of detention pending trial, I did receive and have reviewed a letter submitted by the government, dated May 31. I'm presuming that counsel for Mr. Braun received that as well?

MR. SHARGEL: Yes, we have.

THE COURT: Is there anything that the government

wishes to add to the letter at this point?

MR. TISCIONE: Your Honor, at this time I think I would defer to Mr. Shargel. Since the government has filed a lengthy detention letter, I think our position has been made clear. Obviously, I would appreciate an opportunity to respond to anything Mr. Shargel says on the question of bail, but I believe I'll turn it over to him.

THE COURT: All right. Mr. Shargel?

MR. SHARGEL: Your Honor, before we get to conditions, I would like to address the government's submission, the submission of May 31, 2010. Because I say with all respect that this submission is filled with inaccuracies, mis-statements, mis-information, and I'd like to tell you precisely why.

On the question of risk of flight, I'll address the risk of flight first. The government suggests that Mr. Braun is a risk of flight because, principally, they prominently displayed at the beginning of the letter at page three, or here at the beginning of the letter at page three. The government states that there was in May of 2009, and my own investigation revealed that this was mid-May 2009, that Mr. Braun fled to Israel to avoid apprehension. And the word that I think was carefully chosen is "immediately," that you'll see on page 3, that he "immediately" fled to Israel to avoid apprehension.

That is plainly wrong because we have Mr. Braun's passport here. I've handed it up to your Honor, and you'll see that he left at the end of July of 2009, which is hardly "immediately," and it's hardly probative of the fact that he was fleeing from apprehension or arrest. I can submit this to the Court at the present time, the passport, and it shows that it was on July 24, 2009 that Mr. Braun went to Israel.

It's worthy of note that I am submitting to the Court his passport because the letter that the government submitted is replete with suggestions that Mr. Braun had access to false travel documents, that he was able to travel in other names. Well, that's flatly wrong. He went to Israel and he came back from Israel with the passport, the only passport that he has, issued to him with his picture, his name, his lawful passport.

It's also true that during this period of time he traveled to other countries. That's true, to Canada, and we have entries in his own name regarding the travel to Canada. In January of 2010, he went to the Bahamas. Again, we have the passport which demonstrates that he traveled under his own name.

There came a time in the spring of 2010 when he was arrested in Staten Island on a driving charge, a reckless driving charge. The case was resolved in the Staten Island court, and Mr. Braun retained counsel and

appeared in court, and he was under his own name and he never used another name.

But the unkindest cut of all, if you will, is in support of the proposition that he was using false identification documents or that he had access to false identification documents. The prosecution heralds what it found during the search of his house and said that there were five driver's licenses, five driver's licenses, that were obviously fraudulent.

Well, a check with motor vehicles would reveal that each one of those documents was issued by the New York State Department of Motor Vehicles. Not only were they not obviously fraudulent, they were not fraudulent at all. And moreover, as the government itself acknowledges in the letter, they're all in his name; all, as they say, identical, and do not provide any other identification, do not provide identification in another name. They were all lawful, legitimate driver's licenses that were obtained after driver's licenses were lost. They lend no support to the proposition that Mr. Braun was a risk of flight.

He went to California during this period of time when they say that he was fleeing arrest and traveled, went to airports, all on his own name. All of the travels, whether it be Canada, or Israel, or California, or the Bahamas, were all in his own name. And there is no

suggestion, there is no proof, there is no evidence that he ever traveled under another name.

Let me go back and tell you about Mr. Braun and let me put before you the nature and circumstances of this individual.

The fact is that he has lived in the same house with his parents his entire life. He's 27 years old and he's lived in the same place. You can see from the appearance -- his family is in the courtroom. This is tightknit family who is willing to support him, who is here to support him, people who are here, eight or nine people, who are willing to sign a bond. And they have, again by their mere presence here today, evidenced their support of him.

But more importantly, I'm going back to his own characteristics and his own history and characteristics. He has one prior arrest, a misdemeanor that resulted in an ACD, a marijuana arrest when he was 19 years old, and it resulted in an adjournment in contemplation of dismissal. It was dismissed, the case was dismissed and the record sealed. That's his criminal history.

As I said a moment ago, he still lives with his parents. His mother is a New York City school teacher. She's a first-grade teacher. His father is a shoe salesman. These are modest people. They're willing to put up their

house. They're willing to put up a house that they've owned for over thirty years. Their various family members, including a ninety-year-old parent is in the house, and Mr. Braun's sister is in the house. There is moral suasion here, ample moral suasion, not only with respect to his parents, but with respect to family members who are willing to sign the bond.

Mr. Braun is currently unemployed; that's true, but he has a history, a long history, of employment. He owned his own business for seven or eight years, a cellular phone store. He worked in selling software to pharmacies in New Jersey. He also worked in another retail business related to cellular phones. So he's had a history of employment.

So under the circumstances, the notion that he is a risk of flight is nonsensical. There is no suggestion that he is a risk of flight. There is no suggestion that he used false travel documents. There is no suggestion that he had fled to avoid apprehension. He went to Israel for a period of time. And as I said -- and I emphasize this and I repeat this because the government so strongly urges this as indication that he actually took flight when he didn't to suggest that he had left immediately after a stash house was raided in May of 2009. I think that the same --

And by the way, your Honor, under 3142C(b)(1),

where one of the conditions -- and obviously, I'll be talking about conditions in a moment -- where one of the conditions suggested right in the statute is that the defendant be in the custody of another person. And in this situation we have, as I said, his parents, who are willing to assume that supervision as set forth in the statute.

So, in addition to the question of risk of flight, the government claims that they've proven by clear and convincing evidence that he is a danger to the community. And I respectfully submit to your Honor that, once again, the notion that he's a danger to the community, the submission by the government is wholly, wholly, inadequate.

They say that he's a danger to the community because he will resume or there's a likelihood that he will resume his criminal activities, and they cite the proposition that to be a danger to the community, it doesn't have to be a physical danger. Well, the government can make that contention in any case. And in any case where someone is charged with a serious crime -- and I'm not minimizing the seriousness of the crime that's alleged in this indictment. But nevertheless, the government could always say that someone poses a substantial likelihood, as they say here, that he'll resume his criminal activities.

They go on to say that according to a cooperating witness CW1, that the cooperating witness has stated, quote

-- and I quote from their letter, "In sum and substance," that Mr. Braun threatened and assaulted a worker, and it appears that the claim is that this happened in California. There is nothing in this letter that suggests how CW1 knows this. There is nothing in this letter to suggest how CW1 came to this information, and there is no suggestion that CW1 is reliable in this regard. And the notion that this was said "in sum and substance" leaves a question mark as to what occurred here. CW1 is not corroborated by any other evidence whatever.

And then the government goes on to say at page 6 of the letter that a criminal associate, and text messages with a criminal associate, who is his ex-girlfriend, and text messages are quoted to suggest that somehow he's a danger to the community because he is interfering with this criminal associate.

This is, as I said a moment ago, an ex-girlfriend, and reference is made to the ex-girlfriend later on in the letter. Reference is made to what, essentially, was the equivalent of a lovers' spat. There was an argument that he was having with his girlfriend and text messages were being hurled back and forth. There is nothing to suggest by clear and convincing evidence that there is a danger or Mr. Braun poses a danger.

But as we know, the question in a case like this

with a presumption and in order to rebut the presumption, there are conditions that we are submitting. And here is the bail package that I am submitting, your Honor. I am submitting a bail package, a million-dollar bond signed by nine suretors with real property in excess of a million dollars to support that bond.

I am suggesting that the signature of these suretors presents ample moral suasion. The people who are willing to sign the bond are people who have owned their homes, in some instances, for a very long period of time. In some instances, they are the principal assets of these people, and the moral suasion here is very strong. I am also suggesting a bracelet with a GPS, which has proved to be efficacious.

The government cites cases that are twenty or more years old going back to the 1990s or even earlier where the Second Circuit Court of Appeals had essentially written in a negative way about home detention. But as everyone in this courtroom knows, the efficaciousness of home detention and the use of home detention has become familiar in this courthouse.

It's only two weeks ago that the Second Circuit Court of Appeals in United States v. Persico remanded, as your Honor may know, remanded a case where bail had been denied at the district court level, and the condition

proposed there was remanded on another legal ground, but the condition proposed there was house arrest and the Second Circuit said not a negative word about house arrest.

The idea of house arrest and complete house arrest, as I said a moment ago, has become familiar in this district, as well as in the Southern District. And according to the pretrial services people, the efficaciousness of house arrest is now well familiar, and the efficaciousness of using a GPS particularly in Staten Island, where there is no interference from tall buildings -- that's sometimes argued in the Southern District of New York. The efficaciousness of house arrest with GPS has been recognized and I think it's appropriate in this case. Obviously, there would be a surrender of the passport.

But in addition to all that, the moral suasion, as I said a moment ago, the moral suasion that exists with respect to the number of people who are willing, responsible people, who are willing to come forward and not only sign the bond, but place their property is very profound I respectfully submit.

So I think that under all of the circumstances, the government has not shown by a preponderance of the evidence risk of flight. It has not shown by clear and convincing evidence danger to the community. I think that under the circumstances of this case, the presumption has

been rebutted. The government goes in a paragraph arguing that this is not a "bursting bubble" presumption, that you should still consider the fact that this is a narcotics case where there is a ten-year minimum mandatory sentence as charged.

First, you will note that the government doesn't cite any Second Circuit authority for that proposition whatever, and that each one of the cases they cite, each one of the out-of-circuit cases that they cite, are more than twenty years old.

So the first point that I'm making, given all of these circumstances, is that the government has not met its burden even with the presumption that it has under the statute and that we have rebutted the presumption. That's number one.

But, number two, the question then is: Are there conditions which will satisfy any concerns about danger or risk of flight. And I submit, particularly in light of this showing, which is, I respectfully submit, inadequate, that the conditions are more than ample to allay any concern about risk of flight or danger to the community.

So I think under those circumstances -- you know, Judge, it's not everyday that in a case with the charges contained in this indictment that a young man comes before you, 27 years old, here with his family to support him, a

tightknit, close family, a man who lives with his parents, who is not out on his own, who has never had his own house, who does not own his own car, who does not have any assets overseas, who does not have any property overseas or in any other jurisdiction.

He is a lifelong resident of New York. His roots are deeply placed in Staten Island. They can't be more deeply placed. He was born in Brooklyn and lived in Staten Island, as I said earlier, from the moment of his birth 27 years living in Staten Island.

And I think under those circumstances with those roots so deeply placed in the New York community, with the support of his family, with the proposition that you would have more than ample collateral for a million-dollar bond, with the proposition that the people are willing to come forward and essentially want -- so many people are here because they wanted to share. There were people who came forward and said, "I want to be part of this bond. I want to be part of this bond. I want to be part of this process because we want to show that we support our family member."

And I think that under those circumstances, with house arrest, a GPS, a million-dollar bond, surrender of the passport, that he should be released.

THE COURT: All right. Mr. Tiscione, did you have anything you wanted to say in response?

MR. TISCIONE: I did, your Honor.

First, I would draw your Honor's attention to the pretrial services report. And I think what's most notable about the pretrial services report in this case is actually the information that's not contained in here; specifically, the fact that the defendant refused to provide any information about his finances and his history of drug use. Both of those are important factors that are typically considered when considering how great a risk of flight someone is, how likely they are to comply with conditions that might be set, and if a bond is able to be set, the amount of bond that's appropriate.

And based on the evidence that's been proffered by the government in its detention letter, I submit to your Honor that the defendant refused to answer those questions because to answer those routine questions truthfully would have revealed the enormous flight risk that the defendant posed. The few questions he did answer to pretrial services officers were peppered with half truths and outright lies. And I will just point to two examples of that.

First, he stated that he's lived his entire life with his parents in Staten Island, except for a brief time in which he traveled back and forth to California. In fact, the defendant lived in Florida for a time. He spent a considerable amount of time in Canada. He lived abroad in

Israel and Canada while he was avoiding law enforcement agents after a raid on his stash house in 2009.

Secondly, the defendant mentions that he owns or used to own a cellular phone company. And it is true that he did own that business, and that business did, in fact, sell cellular telephones, but it also served as a vehicle for the defendant to launder millions of dollars in drug proceeds and to provide and supply his criminal associates and underlings with untraceable, undocumented, and unsubscribed telephones and Blackberry devices to commit their criminal acts.

In response to some of the conditions that Mr. Shargel has proposed, I would note to your Honor first that electronic monitoring will not prevent the defendant's flight. Electronic monitoring and home detention cannot the defendant from fleeing. All they can do is tell us after he's already fled.

And as your Honor will probably already know, but if not, I'm sure pretrial services can inform you of this, the realistic circumstances of these electronic monitoring units is that by the time anyone who is in a position to do anything about it is finally notified that the defendant has left, it's already too late. He's probably already across the border or somewhere overseas, and there's absolutely nothing that we can do about it.

There has not been a single case that I know of where somebody who has been on electronic monitoring that has fled was prevented from fleeing because the electronic monitoring bracelet was there. It doesn't prevent them from leaving the house. It doesn't prevent them from leaving the country. All it does is notify us after they've left.

Second, I would note Mr. Shargel had mentioned that some of the text messages that were outlined in the government's detention letter were nothing but a lovers' spat, and the government will acknowledge that some of those text messages were with the defendant's or what appeared to be the defendant's ex-girlfriend.

However, the government would also note that that same individual was a member of the defendant's drug organization who received hundreds of thousands of dollars of drug proceeds on behalf of the defendant. So it's not simply a case of the defendant and a girlfriend having a fight. This is, in effect, a member of his organization who was threatening to rat him out to the police.

And I think it is significant that the response that the defendant made to this individual is that if you make my life uncomfortable, I will do the same to you in a much worse way. Now, those words can be subject to interpretation, but given the context that they're in, I don't think there's any doubt that that is a serious risk of

the defendant tampering with witnesses or harming witnesses or potential witnesses.

Now, as set forth in the government's letter, there are a number of cooperating witnesses in this case, who have previously had very strong and ongoing criminal ties to this defendant. There is a very real risk that if the defendant is released on any conditions of bond, he will attempt to tamper, obstruct, or even harm these witnesses. And the fact that he's on home detention with electronic monitoring is not going to stop that because the defendant would not do the dirty work himself. He would get one of his underlings to do it.

And the fact is that this defendant was able to control his entire criminal empire even though he was on the run from the police and living abroad for several months. And he was able to do this because this organization has used elaborate electronic devices to maintain communications with each other. Typically, they used encrypted Blackberry devices where the phone features of the Blackberry devices are deliberately removed, so they can only be used to transmit pin-to-pin messages to other Blackberries on the server.

And the investigation has revealed that, typically, members of this organization will actually purchase the server itself and a number of Blackberry

devices connected to that server, which are only connected to each other and can only be used to send pin-to-pin messages to other Blackberries on that network.

But the reason why this is important, your Honor, is because this shows that the level of sophistication that is particularly high. Now, there are many drug organizations that employ sophisticated means to commit their crimes, but I do think that this is -- what we're seeing in this case is something entirely new and it's entirely more sophisticated and more difficult for law enforcement to monitor.

There's absolutely no way to intercept those communications because the server is located overseas and it's owned by the criminal conspirators. The only way to see anything from these Blackberries is to actually seize them from a member of the organization, and then you can look at some of the saved text messages that are on there, and that's exactly what we've done in this case. And in particular, we seized two Blackberries from the defendant at the time of his arrest, which contained numerous text messages talking about marijuana shipments.

In particular, on the night of his arrest, a shipment of fifty pounds of marijuana was brought down from Canada to New York at the defendant's direction to an individual in the New York area. That shipment was

intercepted by law enforcement; it was seized. There was fifty pounds of marijuana in it and text messages discussing that specific transaction were recovered on the Blackberry that was found on the defendant at the time of his arrest, and that's just one piece of evidence for one transaction.

The detention letter goes into great detail about some of the other evidence in this case, and I think it's particularly important to look at some of the other evidence that was found at the defendant's house, which I note that Mr. Shargel hasn't mentioned at all.

Like the fact that there was $30,000 in cash wrapped in rubber bands just lying around his house. That, I submit to you is not the typical thing for someone to have. There was also extensive drug records in the house. Those drug records reflect hundreds of marijuana shipments, thousands and thousands of kilograms of marijuana, hundreds of thousands of dollars in drug payments and money that this defendant had access to and was moving into the country, out of the country, from here to California, from here to Florida and back.

The defendant has access to an extensive amount of money, virtually unlimited funds. If these records and the evidence in this case is taken into account about the amount of drugs that this defendant has trafficked -- and I think it's also worthwhile to note that at the time of his arrest,

the defendant had 16 cell phones, including these two encrypted Blackberry devices that I've already spoken about.

Again, while the fact that the defendant had 16 telephones doesn't in and of itself suggest that he's a criminal, taken in context and with all of the other evidence, it is certainly suggestive of, number one, the fact that he's engaging in illegal activities; and number two, that it's going to be very easy for him to get access to another encrypted Blackberry or another means of communication that he will be able to use from his home to direct his underlings to either continue their drug business or attempt to threaten, intimidate, or even harm witnesses in this case.

And I think the only way to prevent that, the only way to insure that the defendant will not tamper with witnesses or continue operating his criminal enterprise is to have him detained as the MDC where all of his communications could be monitored and he won't have access to use encrypted Blackberry devices and 16-plus prepaid cell phones to direct his underlings.

THE COURT: All right.

MR. SHARGEL: May I respond?

THE COURT: Yes.

MR. SHARGEL: Well, first, I know full well that both sides are permitted to submit evidence by proffer. I

understand that. But what you've heard from Mr. Tiscione over the past minutes is essentially Mr. Tiscione's parade of horribles of what could happen and what might happen, and he pushes buttons like obstruction of justice, and if he doesn't do something, he could get his underlings to do something. And the fact remains that when I challenge him on danger to the community about the information supplied by a cooperating witness, we hear nothing about the basis for the assertions that Mr. Tiscione is making, number one.

Number two, Mr. Tiscione points to the pretrial services report and notes that there's no financial information. That was on my advice, as I would advise any client not to supply financial information where there is no opportunity to fully -- that what it is should be on that form. And with respect to drug use, that was on my recommendation.

But the point is that the very pretrial services report that Mr. Tiscione points you to is a report that recommends release on bond. The Pretrial Services Agency recommends release in this case. So I think particular note should be taken of that.

And with respect to risk of flight and the fact that a bracelet doesn't address risk of flight, I would respectfully suggest that the pretrial services officer present in the courtroom report to your Honor about how many

people are on pretrial release with bracelets or home detention because that is frequent in this district. It happens all the time, all the time. It's familiar and Mr. Tiscione is arguing like it were ten years ago and no one was familiar with employing the electronic bracelet.

And the GPS is new, and the GPS is something that has been embraced, as I understand it from conversations with members of the Pretrial Services Agency. It's been embraced by the Pretrial Services Agency in this district. They want to promote its use in this district, and it has proved to be efficacious.

There is no suggestion by Mr. Tiscione -- he references the fact that anyone who left who had been under house arrest and fled hasn't been captured again. I don't know where these statistics are coming from. Actually, I heard no statistics. I don't know how many people because I think the number is close to zero. I don't know how many people have fled from home detention.

And I respectfully submit that this is frequently used. There are mafia RICO cases pending in this district right now where people are released on conditions and the condition be home confinement with a bracelet. In the most serious kinds of cases, cases even involving charges of homicide, people have been released here and in the Southern District in those cases under home detention. So home

detention has proved efficacious.

The travel to Israel, now there is no more reference in Mr. Tiscione's argument about false documents. He was there for six weeks. I don't think under any analysis or anyone's view of the case that being in Israel for six weeks, as documented by his passport, amounts to living in Israel.

I don't believe that traveling to Florida or traveling to California or traveling to the Bahamas, again, under one's own name, one's own passport, is living in other jurisdictions. He has -- and I stand by that proposition -- he has, in fact, been living with his parents for 27 years.

Mr. Tiscione said, well 16 cell phones. By the way, he was in the cell phone business. But 16 cell phones in his house doesn't mean he's a criminal.

Judge, with all respect, this detention hearing is not to determine whether this defendant, whether my client Mr. Braun, is a criminal. It's to determine whether he's entitled to pretrial release on conditions. That's what the detention hearing is about. And I think under all of these circumstances, we have shown and we have met our burden of rebutting the presumption.

THE COURT: The government has convinced me that no combination of conditions can secure Mr. Braun's presence. The government has pointed to what I believe is

substantial evidence of Mr. Braun's involvement in this conspiracy, which involves really huge amounts of marijuana, which means that there are huge amounts of money that he has access to. Five hundred thousand dollars was seized in one seizure alone.

The scale of this enterprise convinces me that there are substantial funds that Mr. Braun is likely to have access to, all of which could be used, of course, to pay any losses that may be suffered by those who are prepared to put up their homes and more importantly to facilitate any travel and any effort to hide his whereabouts.

So I'm not convinced that there is clear and convincing evidence that he would be a danger because he would harm somebody physically. I don't buy that part of the government's argument, but the government has persuaded me that there is substantial evidence of Mr. Braun's involvement in a high level, very sophisticated operation involving millions and millions of dollars of drugs, which makes him a risk of flight that cannot be overcome.

So that's the ruling. Detention is ordered.

MR. SHARGEL: Will we have something from the Court in writing that I could use to press an appeal to the district court?

THE COURT: I'm going to enter an order, which will refer to the record.

MR. SHARGEL: Very well.

THE COURT: Certainly, the Court is relying on the assertions made by the government with respect to the evidence of Mr. Braun's involvement in this conspiracy and the amounts of money that this conspiracy has generated. The government has also persuaded me that it has substantial evidence of intercepted conversations and intercepted other kinds of communications that substantiate Mr. Braun's involvement in this conspiracy.

There's no question about his travel, that he has traveled. That means he has access to people in places in foreign countries where he could find a "sucker," if that's the right word. So those are all considerations. The government has persuaded me under its submission and with the further statements made today, so I'm relying on all of it.

* * * * * * * * *

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

ELIZABETH BARRON June 4, 2010